

This record is a partial extract of the original cable. The full text of the original cable is not available.

C O N F I D E N T I A L SECTION 01 OF 04 THE HAGUE 001885

SIPDIS

DEPARTMENT FOR S/WCI - PROSPER/RICHARD, L - WTAFT, L/UNA -  
BUCHWALD/COGAN, L/AF - GTAFT

E.O. 12958: DECL: 10/13/2010

TAGS: [PREL](#) [PGOV](#) [KAWC](#)

SUBJECT: ICC: GETTING DOWN TO BUSINESS?

REF: A. KINSHASA 707

[B](#). THE HAGUE 2779

[C](#). THE HAGUE 1016

[D](#). THE HAGUE 1837

Classified By: Deputy Legal Counselor David Kaye per reasons 1.5(b)-(d)

[1](#)1. (SBU) Summary: The next few months will see the International Criminal Court (ICC) begin formal investigations into serious charges of war crimes and crimes against humanity in Africa. The Office of the Prosecutor (OTP) recently opened its first investigation in the Democratic Republic of the Congo (DRC) and is set to commence another in Uganda this week. Lacking specific cases, the judges are focused on rules and regulations for their work, while OTP and the Registry are gearing up in staffing and organization. As a consequence, ICC staffing levels have been expanding over the past several months and are set to continue growing through 2005. Embassy legal officers' conversations with diplomats and other contacts in The Hague who follow the ICC closely say that ICC staff, from the senior leadership to the rank-and-file, remain both excited and anxious about their prospects. Typical symptoms of start-up international organizations -- bureaucratic infighting, energetic gossip, and individual ambition -- may also be less pronounced as the OTP turns the organization's attention to specific cases. End Summary.

[1](#)2. (C) The sense of movement in the ICC is palpable, from the rank-and-file -- who express excitement about the uptick in concrete work assignments -- to the senior staff. (Ref C discusses the very different mood pervading at the ICC just months ago, in April 2004). In a chance conversation at a friendly embassy's reception, Philippe Kirsch of Canada told Embassy legal officer that he was, until six months ago, wondering why he agreed to join the ICC as President. It lacked work, its political prospects were poor, and bureaucratic infighting among the Registry, Chambers and OTP was rampant. Now, he says, things are better. The Registrar, Bruno Cathala of France (an effective deputy registrar at the International Criminal Tribunal for the former Yugoslavia (ICTY) but widely seen as ineffective within the ICC), now "knows he works for me," Kirsch said, though "he remains difficult." The place is "consumed by gossip" more than he expected. He said the judges are busy with the rules and regulations, but that OTP is "focused." Kirsch said he is pressing Chief Prosecutor Luis Moreno-Ocampo of Argentina to do more outreach, but he "still doesn't understand how important that is." Kirsch added that he wants the ICC to begin its work so that people will no longer will be able to speculate on "whether we are or will be politically motivated. The proof that we are not," he said, "will be in our actions."

-----  
Early Investigative Efforts  
-----

[1](#)3. (C) In June, it was announced that three Pre-Trial Chambers were established, organized to address legal matters that arise prior to the commencement of trial proceedings. This is a necessary first step to hearing cases, a reality that drew closer when the OTP commenced its first investigation. On June 21, Ocampo notified ICC states parties that OTP "determined that there is a reasonable basis to commence an investigation into crimes allegedly committed in the territory of the Democratic Republic of the Congo (DRC)" since 1 July 2002. The situation was officially referred to the ICC by the DRC in March 2004 and the OTP made the announcement after an initial examination of the situation (Refs A and B). Though it will first focus on events in the northeastern region of Ituri, the ICC stresses that its decision to open an investigation means that it will cover all aspects of a referred "situation;" this includes parts of the situation outside the initial focus region, and potentially contrary to the wishes of the DRC. Ocampo says that OTP "has evaluated the information available on issues of jurisdiction, admissibility and the interests of justice with respect to the entire territory of the DRC." He has found a "potentially widespread pattern of victimization, including but not limited to rape and other sexual violence, torture, child conscription, and forced displacement." That

said, he has also told members of his staff that, if he can focus on simply one count of murder, for example, in a particular case with confidence that he could gain a conviction, he would be willing to limit his indictments accordingly. He expects to focus on "those who bear the greatest responsibility for crimes," a clear allusion to his desire to focus on senior-level perpetrators.

14. (C) Embassy legal officers have also learned that Ocampo will notify states parties on July 28 (and issue a press statement on July 29) of his decision to "commence an investigation into crimes allegedly committed in northern Uganda" since July 1, 2002. (Notification and press statement emailed to S/WCI and L/AF.) Like the DRC, Uganda referred the situation in the north, involving activities of the Lord's Resistance Army (LRA), to the OTP, and OTP officials have engaged Kampala closely in seeking its cooperation in the event of an investigation. Legal officer was told that Kampala agreed to the ICC condition that any investigation will examine not only LRA acts, but also those of government forces. The July 28 notification will also note that "Ugandan authorities have not and do not intend to conduct national proceedings, preferring instead that the cases be dealt with by the ICC." Embassy legal officer has also learned that the Sudanese Foreign Minister, who passed through The Hague last weekend, met with Ocampo on July 24; Ocampo is interested in obtaining Khartoum's cooperation in the Uganda investigation. In particular the ICC wants assistance in the Uganda-Sudan border areas where the LRA operates. That said, an OTP official noted that Sudanese officials may also be involved in sheltering LRA members and could be criminally liable under the ICC Statute (as aiders and abettors, for instance) for such actions.

15. (SBU) The Jurisdiction, Complementarity and Coordination Division (JCCD) is charged with reviewing the scores of individual communications received by the OTP. (NB: Individuals may communicate directly with the OTP so as to bring to its attention possible crimes within ICC jurisdiction. Embassy legal officers understand that a majority of the communications -- largely from U.S. citizens -- have either been spurious or concern matters outside the ICC's jurisdiction.) According to the recently released draft budget, by the end of 2003, nearly 800 communications had been received, and the ICC is projecting a near tripling of that number in the next fiscal year; the organization projects that these communications will result in about ten situations that will merit further substantial study. Though there are additional countries already receiving ICC attention -- include Cote d'Ivoire, Colombia and Venezuela -- there is no indications that these States will become subjects of formal investigations in the near term.

16. (C) Meanwhile, the JCCD is working to develop cooperative relationships with governments and international organizations. An official OTP team is currently in the DRC seeking such cooperative arrangements with the government and others. OTP has not, however, been able to guarantee governments that information provided will be kept strictly confidential, if so requested. Lawyers in the JCCD have

#### SIPDIS

struggled to convince the judges that governments will be hesitant to share sensitive information if they have no ability to control the dissemination of that information beyond OTP. The judges have thus far, however, jealously guarded what they see as their right to see all information, whether provided in confidence or not, and it remains unclear whether their jealousy extends to all information or just information that may be considered as "exculpatory" to a defendant. This issue has proven difficult at the ICTY and has already begun to be played out in the ICC with no solution yet in sight. Embassy officers understand that a less difficult cooperation agreement with the United Nations is in its end stages of negotiation. ICC officials consider this to be an important agreement, especially given the heavy UN presence in the DRC (in the form of MUNOC). Further, embassy legal officers have been told that MUNOC may already have some potential ICC investigative targets (or witnesses) in custody.

17. (SBU) A signature component of Ocampo's vision for OTP rests on his often repeated maxim that "true success for the ICC would be for the Court not to prosecute anyone." (Ref B) Ocampo hopes to use the mere threat of ICC involvement in order to push domestic systems into compliance with international norms, thus allowing violations to be tried where they occur rather than in The Hague. This use of the ICC as a stick is being called "positive complementarity," and OTP apparently plans to use this method in dealing with certain countries, such as Colombia, in the near future.

18. (SBU) In preparation for the first meeting of the Assembly of States Parties to be held in The Hague (September 6 - 10), the Registry has released its draft budget for 2005. The document calls for a total 2005 budget of 70 million Euros, with about half dedicated to the Registry, and just under a quarter assigned to OTP. Nearly 60 percent of the budget goes to staffing costs. The budget calls for a 40 percent increase in staff over the next fiscal year, which may total up to 800 staff by the end of 2005, a number which includes the addition of several new senior staff members. The OTP is currently engaged in a search for a deputy chief prosecutor and has selected two further senior prosecutors (to augment the sole senior prosecutor now in post). Both new senior prosecutors (alumni of the ICTY) will join the Court before the end of this year. The document also notes that the ICC has yet to finalize the location of its permanent facilities, which are projected to include space for all units of the ICC, including a detention center. (The Court currently occupies half of a building in Voorburg, south of The Hague; it shares the building with Eurojust. The facilities are said to be insufficient for full operations of the Court, and staff complain about the quality of the premises and cramped office space.)

19. (SBU) The growth in personnel has not come without difficulty, especially for the ICTY across town. The ICC is, by and large, only offering one-year contracts, limiting the attractiveness of a post to some candidates (though this is similar to the ICTY). Further, within the Court, and especially from member States, Ocampo has received significant flak following his decision to appoint an American as his first senior prosecutor; he has apparently decided not to hire any further non-member State nationals to posts in OTP. (NB: Officially, ICC hiring guidelines hold that a non-member State national can be considered for a post only if she is more qualified than any applicant from a member State.) Gaining posts for their nationals preoccupies a number of member States, and all areas of the ICC have felt some pressure by member States lobbying for specific candidates. To support its growth, the organization is borrowing (or taking) from the United Nations. It has devised its staffing structures, salary levels and nomenclature to match the UN's and it has adopted significant portions of the UN staff manual. Further, the organization of the OTP will follow the UN model established by the ICTY and ICTR, and will be structured with prosecutors separated into case-specific teams. Many investigators, lawyers and staff from the ICTY (located only a few miles away) have left the Tribunal and joined the ICC.

-----  
Comment  
-----

110. (C) The ICC is set to expand significantly over the coming year, burrowing into The Hague landscape for the long-term. Expansion will need justification in the form of investigative and prosecutorial activity, and this is clearly the ICC's general focus now. Interestingly, its first two formal investigations were initiated by the subject governments themselves; in that sense, they may not provide the ICC with the political test that would come with a more contentious exercise of jurisdiction (e.g., a case where the subject state, while unwilling or unable to pursue investigation or prosecution of crimes itself, nonetheless objects to ICC action). They will, however, provide the ICC with a direct test of its investigative and, one expects, prosecutorial capabilities. Observers and ICC parties, especially those who will bear the burden of financing the growing organization, will undoubtedly be poring over the ICC's reports to determine whether it is working efficiently and effectively. Apart from the attention to actual investigations, we expect two other issues to concentrate the minds of ICC-watchers. One is the focus on Africa, as we have already heard of concern that the ICC could become the "criminal court for Africa." Second is the potential for Ocampo's "positive complementarity" to work too successfully, from the perspective of committed ICC-backers. That is, would the increase in credible domestic prosecutions -- encouraged by Ocampo -- serve to undermine the justification for the ICC's substantial growth through 2005? Its activities over the coming months may bear out the direction of the ICC in both of these areas. End comment.  
SOBEL